Editor's note: 78 I.D. 5

UNITED STATES
v.
PAUL M. THOMAS ET AL.

IBLA 70-46 Decided January 12, 1971

Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Discovery: Marketability

To satisfy the requirements for discovery on a placer mining claim located for a common variety of pumiceous material before July 23, 1955, it must be shown that the exposed material could have been removed and marketed at a profit on that date, as well as at the present time; where such a showing is not made, the claim is properly declared null and void.

Mining Claims: Common Varieties of Minerals: Marketability

Where it appears that some material was removed from a mining claim and marketed prior to July 23, 1955, but it also appears that the market for such material terminated before that date, and where there is no positive evidence of the removal thereafter of any significant quantity of material from the claim for purposes other than fill material, it is properly concluded that the material was not marketable on July 23, 1955.

Mining Claims: Common Varieties of Minerals: Special Value -- Mining Claims: Common Varieties of Minerals: Unique Property

The fact that pumiceous material may occur in nature in pieces having one dimension of two inches or more does not, by itself, establish that the material is "block pumice" which is excluded by statute from the category of common varieties of pumice.

Mining Claims: Common Varieties of Minerals: Special Value -- Mining Claims: Common Varieties of Minerals: Unique Property

To determine whether a deposit of pumiceous material is a common variety, there must be a comparison of the material in that deposit with other similar-type materials in order to ascertain whether the material has a property giving it a distinct and special value; where the material can be used for purposes for which common varieties of other materials can be substituted, and where it is not shown that it has any advantage over such substitute materials which is reflected in a higher price in the market place, it is properly determined that the material is a common variety not subject to location under the mining laws of the United States after July 23, 1955.

IBLA 70-46	:	Arizona Contest No.
	:	033071
UNITED STATES	:	Patent application
v.	:	rejected and placer
PAUL M. THOMAS ET AL.	:	mining claim declared
	:	null and void
	:	Affirmed

DECISION

Paul M. Thomas, Gilbert E. Olson and Ida L. Thomas, executrix of the estate of Roger C. Thomas, have appealed to the Secretary of the Interior from a decision dated March 21, 1969, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner rejecting their application, Arizona 033071, for patent to the Bill Williams No. 4, Aluminum Oxide Nos. 1, 2, and 4, and a part of the Aluminum Oxide No. 7 (amd.), placer mining claims and declaring the claims to be null and void.

Appellants' claims were located during the period September 19, 1947, to September 8, 1954 (Exs. 24, 25). They are situated approximately 1-3/4 to 3 miles south of Williams, Arizona, and embrace lands in secs. 9, 15 and 16, T. 21 N., R. 2 E., G.&S.R.M., Kaibab National Forest, Coconino County, Arizona. According to appellants' patent application, filed on November 7, 1963, the claims contain "a valuable deposit of pumice and cinders which has been and is being marketed as a mineral aggregate."

Upon the recommendation of the Forest Service, United States Department of Agriculture, a contest complaint was filed in the Arizona land office on June 8, 1966, on charges that:

> 1. A valid mineral discovery, as required by the mining laws of the United States, does not exist within the limits of the Bill Williams Placer Mining Claim #4, Aluminum Oxide #'s 1, 2, 4, and Aluminum Oxide No. 7 (amd.) placer mining claims.

2. The land within the limits of the said placer mining claims is nonmineral in character within the meaning of the mining laws.

A hearing was held at Phoenix, Arizona, on February 1, 2, 3, 6 and 7, 1967. From the evidence developed, the hearing examiner found, in a decision dated May 21, 1968, that, although most of the contestees' witnesses consistently referred to material exposed on the claims as pumice, the contestant's expert witness, Robert E. Wilson, as well as the contestees' expert witness, George A. Kiersch, Chairman of Geological Sciences at Cornell University, described the material as "pumiceous material." Since pumiceous material is not a true pumice, the hearing examiner said, it cannot be classified as "block pumice" which is expressly excepted by section 3 of the act of July 23, 1955, as amended, 30 U.S.C. § 611 (1964), from the category of common varieties of pumice. He further found that deposits of pumiceous materials are of widespread occurrence in northern Arizona, that the pumiceous materials on the claims are suitable for many uses, including lightweight aggregate, concrete block, precast concrete products, acoustical plaster and base course, but that none of the unusual characteristics ascribed to them by contestees' witnesses had been shown to render the materials suitable for uses over and above the normal uses of the general run of such deposits. The fact that production from the adjacent patented Aluminum Oxide No. 5 claim was phased out in 1954, he stated, and that scoria volcanic cinders were used thereafter in the manufacture of concrete, showed clearly that cinders could be substituted for pumiceous material in such products. He concluded that the pumiceous materials on the claims are of a common variety, not subject to mining location after July 23, 1955, and in order to establish the validity of the claims, the deposits on the claims must be shown to have been marketable prior to that date.

The hearing examiner found the testimony of the Government's witness, Wilson, that no cinders had been removed from the claims, to be unrefuted by specific evidence. He also determined that significant amounts of material had been removed from only two places -- the "Massey pit" on the Aluminum Oxide No. 1 claim and the "pumice pit" in the extreme northeast corner of the Aluminum Oxide No. 4 claim. There was no positive evidence, he found, of the use of any significant portion of the material removed from the Massey pit after 1954 in the manufacture of concrete or for

any purpose other than as fill. 1/ Nor did he find evidence of removal, after that time, of pumiceous aggregate, the bulk of which had been supplied from the patented Aluminum Oxide No. 5 rather than from the contested claims. The market which previously had existed, the hearing examiner found, was supplied after 1954 from other cinder deposits in northern Arizona. From these findings he concluded that the deposits were not marketable on July 23, 1955, and declared the claims null and void for lack of a valid discovery. 2/

The Office of Appeals and Hearings concurred in the findings of the hearing examiner, rejecting arguments raised by appellants before the Director, Bureau of Land Management, that the hearing examiner had erred in applying the act of July 23, 1955, and that the proceedings before the hearing examiner had been so onerous and unfair as to deprive the contestees of due process of law.

In appealing to the Secretary appellants argue, in substance, that:

(1) All of the contested mining claims were located before July 23, 1955, and there is, therefore, no requirement that the mineral deposits on the claims be other than common varieties in order to constitute a valid discovery;

1/ Material which is valuable primarily for fill use has never qualified as a mineral subject to location under the mining laws. United States v. George W. Black, 64 I.D. 93 (1957), and cases cited; United States v. E. A. Barrows and Esther Barrows, 76 I.D. 299 (1969), aff'd, Esther Barrows v. Walter J. Hickel, Civil No. 70-215-F, in the United States District Court for the Central District of California (April 20, 1970), appeal docketed, No. 25944, 9th Cir., May 6, 1970.

2/ The hearing examiner also found that Public Land Order No. 3417 of July 30, 1963 (Ex. 1), withdrew the lands embraced in the Aluminum Oxide Nos. 4 and 7 claims and the north half of the Aluminum Oxide No. 2 claim from mining entry as of July 29, 1955, the date on which the application for withdrawal was filed in the Arizona land office. The fact of the withdrawal is inconsequential unless the validity of those claims rests upon a discovery of an otherwise-locatable mineral after July 23, 1955.

(2) The pumice on the claims is "block pumice" which is expressly excluded from the category of common varieties of pumice;

(3) The mineral deposits on the claims have properties which give them a "distinct and special value" which removes them from the category of common varieties;

(4) The evidence shows continued marketability and production of material from the claims prior to, during and subsequent to July 23, 1955; and

(5) The decisions of the hearing examiner and the Office of Appeals and Hearings are not supported by the evidence and are, therefore, a denial of administrative due process to appellants.

In challenging the applicability of the act of July 23, 1955, to mining claims located prior to that date, appellants assert that the legislative history of section 3 of the act "clearly shows that the Congress had no intention of changing the mining law of the United States so as to affect rights under existing valid mining claims." (Emphasis added.) We have no quarrel with appellants over that assertion. However, appellants assume one of the critical facts in issue, i.e., the validity of the claims on July 23, 1955.

Appellants' contention is one which has been urged and rejected many times. In United States v. Charles H. Henrikson and Oliver M. Henrikson, 70 I.D. 212 (1963), aff'd, Henrikson v. Udall, 350 F.2d 949 (9th Cir. 1965), cert. denied, 380 U.S. 940 (1966), as well as in numerous other decisions (see, e.g., United States v. Kenneth F. and George A. Carlile, 67 I.D. 417 (1960); United States v. Fisher Contracting Company, A-28779 (August 21, 1962); United States v. William M. Hinde et al., A-30634 (July 9, 1968); United States v. E. A. Barrows and Esther Barrows, supra, n. 1), the Department has held the validity of a mining claim located prior to July 23, 1955, for a common variety of sand, gravel or other material specified in the act of that date can be established only by showing the requirements of a discovery were satisfied before the date of the act. Those requirements include a showing that the material on a claim could have been profitably mined and marketed on that date. United States v. Alfred Coleman, A-28557 (March 27, 1962), aff'd, United States v. Coleman, 390 U.S. 599 (1968).

Appellants' attempt to avoid the consequences of the ruling in the Henrikson case, supra, by arguing that, although the Department's decision was affirmed by the United States District Court for the Northern District of California in Henrikson v. Udall, 229 F. Supp. 510 (1964), the court "clearly did not affirm the Secretary's erroneous application of 30 U.S.C. to mining claims located prior to the 1955 Act."

Appellants' position is untenable. The Henrikson case, also, involved the determination of the validity of a mining claim located prior to July 23, 1955, for a material (sand and gravel) of common variety. The primary distinction between that case and the one before us lies in the fact that, whereas in this case there is a question with respect to the marketability of the material on the claims on July 23, 1955, in Henrikson the question was whether sufficient work had been done by that date to ascertain the existence of sand and gravel in sufficient quantity to constitute a valuable mineral deposit. The Department's determination in the Henrikson case that the claim was invalid could be sustained only upon acceptance of the premise that the location of a mining claim for a deposit of a common variety of sand, gravel or other mineral named in the 1955 act, unperfected by a discovery prior to the date of the act, established no rights against the United States. Accordingly, appellants were properly required to demonstrate a discovery on each of the contested claims prior to July 23, 1955, if the materials found thereon are common varieties of pumice, cinders or other material.

If the materials on appellants' claims are not "common varieties," of course, the significance of a discovery before July 23, 1955, is immaterial. However, it must be shown, in any event, that there was a valid discovery on each claim at the time of the application for patent. That is, irrespective of the date on which a discovery may have been made, the claims are now invalid if, because of exhaustion of the deposits, a change in economic conditions, cessation of a market for the material, or some other equally cogent factor, the value of the minerals will not justify further expenditures for the development of a mine. See, e.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1964); Adams v. United States, 318 F.2d 861 (9th Cir. 1963); Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964); United States v. R. W. Wingfield, A-30642 (February 17, 1967); United States v. Evelyn M. Kiggins et al., A-30827 (July 12, 1968); United States v. Warren E. Wurts and James E. Harmon, 76 I.D. 6 (1969).

We note at this point that it was not alleged in the contest complaint that the materials found on appellants' claims were "common varieties." Nor was it expressly charged that a discovery had not been made prior to July 23, 1955. It appears, in fact, that the contestants' basic premises in contesting the claims were that the materials for which the claims were alleged to be valuable do not occur in sufficient quantity to sustain a commercial operation and the materials cannot now be produced and sold at a profit (see Tr. 27-28).

Without making any findings with respect to the quantity of the mineral materials present on the claims or their present marketability, as we have seen, the hearing examiner concluded from the evidence that the materials shown to exist are common varieties for which no market existed on July 23, 1955. This conclusion is not necessarily incongruous, however. The first charge of the complaint (that a "valid discovery, as required by the mining laws of the United States, does not exist" within the limits of the claims) could be sustained upon a finding either that (1) the materials found on the claims cannot presently be mined and marketed at a profit or (2) the materials are common varieties of pumice, or other substance, for which there was no market on July 23, 1955.

We turn now to the question of whether or not the materials on the claims are, in fact, common varieties of pumice, cinders or other material removed from operation of the mining laws by the 1955 act. We do not find it necessary to determine whether, as the hearing examiner and the Office of Appeals and Hearings found, "pumiceous material is not a true pumice." Even if we assume that there is no clear distinction between "pumice" and "pumiceous material," it does not necessarily follow that pumiceous material occurring in nature in pieces having one dimension of two inches or more is "block pumice." 3/

3/ The 1955 act expressly excepts from the category of "common varieties" deposits of "so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more." 30 U.S.C. § 611 (1964). The statute does not define "block pumice." Nor have we found the term in any glossary of technical terms. It seems clear, however, that the drafters of the statute contemplated a material of fairly definite specifications which had a recognized use in industry. Thus, in reporting the bill which ultimately became the act of July 23, 1955, the House Committee

As the decisions below stated, appellants' witness, Kiersch, after defining pumice (Tr. 351) and acknowledging that many materials are pumiceous but may not necessarily meet a specific geologic classification of pumice (Tr. 365), stated that he "would prefer" to call material from the claims "pumiceous material" (Tr. 366-367). Although other witnesses referred to material from the claims as pumice, no witness described any of the material as "block pumice." In the absence of competent evidence to that effect, we cannot conclude that "block pumice" has been shown to exist anywhere on appellants' claims.

Even if the material is not "block pumice," appellants argue, it is an uncommon variety of pumice because of properties which give it a distinct and special value. The properties which allegedly do this are:

Fn. cont.

3/ on Interior and Insular Affairs stated that the clause excluding "block pumice" from common varieties of pumice "recognizes a class of pumice having distinct and special properties." H.R. Rep. No. 730, 84th Cong., 1st Sess. 9 (1955).

It is reported in Bureau of Mines Bulletin 630, Mineral Facts and Problems (1965), that:

"Under various conditions pumice competes as a lightweight aggregate with expanded clays and shales, expanded perlite, exfoliated vermiculite, slag, cinders, and diatomite. . . .

"As an abrasive in block form, pumice competes in the market with brick made from silicon carbide, aluminum oxide, and natural rock such as novaculite and sandstone.

. . . .

"Pumice used as a concrete aggregate, railroad balast, and for road surfacing is sold in a low-price market and must compete with many substitutes. Hence the market area for any deposit is limited by transportation costs and the availability of competitive materials. As abrasives, pumice sells at a much higher average unit price; transportation is a smaller part of the total cost, and shipments are made over much greater distances. High-quality pumice is imported from foreign sources in crude form for processing domestically for abrasive purposes." P. 736 (emphasis added).

It may reasonably be inferred that the "block pumice" which is not a common variety must be of abrasive grade and the term was not intended to embrace all pumiceous materials occurring in nature in pieces having one dimension of two inches or more. There is no evidence that the material found on appellants' claims is marketable as an abrasive.

(1) The material is stronger than common pumice;
(2) It is less absorbent than common pumice;
(3) It is more coarse and does not generate fines as does common pumice;
(4) It can be run through a crushing cycle without powdering;
(5) It can be used as a lightweight concrete aggregate; and
(6) It has an extraordinary insulation quality.

The Department has held that, in order to determine whether or not a deposit of stone, or other material, has a unique property which gives it a distinct and special value, there must be a comparison of the material under consideration with other deposits of similar materials. It must then be shown that the material under consideration has some property which gives it value for purposes for which other materials are not suited, or, if the material is to be used for the same purposes as other materials of common occurrence, that it possesses some property which gives it a special value for such uses, which value is reflected by the fact that it commands a higher price in the market place. Differences in chemical composition or physical properties are immaterial if they do not result in a distinct economic advantage of one material over another. United States v. U.S. Minerals Development Corporation, 75 I.D. 127 (1968); United States v. Gene De Zan et al., A-30636 (July 24, 1968); United States v. Alice A. and Carrie H. Boyle, 76 I.D. 61 (1969), as supplemented, 76 I.D. 318 (1969). Moreover, the comparison is not limited to other deposits of the same material. That is, it may not be enough to show that pumice from a particular deposit can be used for purposes for which ordinary pumice cannot be used. If the special use to which it may be adapted is one for which common varieties of other materials are equally adaptable, and if the price commanded by the pumice is not greater than that paid for other materials, pumice must still be considered a common variety. See United States v. Norman Rogers, A-31049 (March 3, 1970). Assuming that material from appellants' claims has all of the characteristics attributed to it and the Williams deposits are, as indicated by appellants' witness, Gilbert Olson, the only source of pumice in the State of Arizona suitable for the manufacture of concrete block (Tr. 101-104), what is the special and distinct value derived from these properties?

As noted, the hearing examiner found the pumiceous materials on appellants' claims are suitable for a number of uses. Whether or not other pumiceous materials found in Arizona can be used for all

the purposes for which appellants' materials reportedly are adaptable, it is clear from the record that other materials are used for all of the listed uses. There is, in fact, no evidence that material from appellants' claims can be used for any purpose for which a common variety of some material is not already being used or that the material from appellants' claims has any advantage over other materials with which it must compete which is reflected in the market price which it can bring. Accordingly, we cannot conclude from the showing appellants have made that their "pumice" has a distinct and special value.

Appellants suggest that, if the Secretary is not convinced that the pumice from the contested claims commands a higher price at the market place than material not having such special properties, he should remand the case for the development of more complete and full evidence on this issue. The Secretary has, in several recent decisions, remanded cases for the development of additional evidence relating to the market price of material where the evidence bearing upon that question was inconclusive. Appellants, however, have not offered any evidence that material from their claims commands a better price than other materials used for the same purposes. In the absence of an offer of proof, there is no reason for further inquiry into the question.

In support of their contention that the decisions below constitute a denial of due process, appellants argue that there must be support in the record for a decision. The decisions appealed from, appellants charge, clearly are not supported in the record and are, therefore, a denial of administrative due process.

There can be no doubt that an administrative decision must have support in the record. However, there is an enormous gulf between the acceptance of that rule and the conclusion that a particular decision is not supported by the record. Appellants have attempted to bridge that gulf with a single giant step which we are unable to duplicate.

Having concluded that the provisions of the act of July 23, 1955, are applicable in this case and the evidence does not establish the uncommon nature of the materials found on appellants' claims, there remains only the question of whether or not the deposits were, by virtue of the then-existing market, valuable mineral deposits on July 23, 1955.

Careful review of the record is conclusive that the hearing examiner's factual findings, which have previously been set forth, are supported by the evidence. Those findings justify his conclusion that a discovery, within the meaning of the mining laws of the United States, has not been shown on any of the claims in question. Accordingly, the claims were properly declared null and void.

Appellants have petitioned the Secretary to grant an opportunity to present oral argument in this matter. They have not, however, shown wherein such argument would serve a useful purpose, and the petition is hereby denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

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Martin Ritvo, Member

I concur:

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Edward W. Stuebing, Member

I concur:

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Francis E. Mayhue, Member